



CONFEDERATED TRIBES
of the

Umatilla Indian Reservation

P.O. Box 638

PENDLETON, OREGON 97801

Area code 503 Phone 276-3447 FAX 276-3317

RECEIVED

OCT - 4 REC'D

Environmental Cleanup Office

September 25, 2000

Docket Coordinator, Headquarters
U.S. Environmental Protection Agency
CERCLA Docket Office
(Mail Code 5201G)
1200 Pennsylvania Avenue NW
Washington, DC 20460

RE: Portland Harbor Listing, July 27, 2000

Dear Docket Coordinator:

INTRODUCTION

On July 27th, the Environmental Protection Agency (EPA) issued a proposed rule listing Portland Harbor on the National Priorities List (NPL or Superfund) for Uncontrolled Hazardous Waste Sites. The comments that follow shall serve as the comments of the Confederated Tribes of the Umatilla Indian Reservation (CTUIR). The primary concern of the CTUIR is that the entire Portland Harbor site be listed on the NPL and that there be a mechanism for tribal participation in all phases and elements of a coordinated clean-up. Additionally, the CTUIR is concerned that the proposed bifurcation of the site, giving the state lead on the upland sites under state authority, jeopardizes the interests of the Natural Resource Trustees by splitting the legal authorities under which the site is cleaned-up and Natural Resource Damage actions are maintained.

Over the last 18 months, the CTUIR has been involved in discussions with EPA and the Oregon Department of Environmental Quality (ODEQ) regarding the necessary clean-up and treatment of the Portland Harbor site. In over a year of negotiations it was finally settled that a state deferral could not possibly protect the rights of all the Natural Resource Trustees (NRTs). The last meeting with the NRTs occurred on March 10th, including participation by the CTUIR, EPA, ODEQ the Potentially Responsible Parties (PRPs), U.S. Fish and Wildlife Service and the National Marine Fisheries Service through the National Oceanic & Atmospheric Administration and the other NRT tribes (Siletz, Grand Ronde, Warm Springs, Yakama Nation, and the Nez Perce Tribe.)



140071

Since the March 10th meeting between the tribes, EPA, ODEQ and the federal NRTs, there has been no formal communication to the tribes from the federal or state government agencies working on Portland Harbor. Since the listing proposal in the Federal Register on July 27th, there have been two staff meetings between the tribes and EPA to discuss the ramifications of the listing, yet EPA staff have yet to answer specific questions as to how this type of listing will effect NRT interests nor how tribal participation will be provided for in a bifurcated clean up.

1. SITE BIFURCATION

The Governors July 7th letter to EPA concurring in the listing of Portland Harbor on the NPL had attached to it a document entitled Portland Harbor Cleanup Statement of Principles (Principles) (Attached). These principles sought to define the responsibilities of ODEQ and EPA, bifurcating responsibility for lead in the clean-up. One statement that is of particular concern is:

The Portland Harbor Cleanup includes upland and in-water contamination. DEQ, using state cleanup authority, will have lead technical and legal responsibility for the upland contamination and for coordinating with EPA on upland contamination, which may impact in-water contamination. EPA, using federal Superfund authorities, will have lead technical and legal responsibility for in-water contamination. Under the auspices of EPA's lead on in-water contamination, DEQ will provide technical support, coordination of state critical initiatives, and assistance in implementing the public involvement program.

Governors Letter to Carol Browner, July 7th, 2000.¹

This document purports to divide responsibilities of EPA and ODEQ between upland and in-water pollution. This is an extremely unusual proposal because it seeks to define an NPL site geographically rather than by releases. Additionally, it seeks to allow state lead of sites that should be on the NPL, under state laws and state regulations. Staff have noted that this may not even be legal. In the listing documents it is noted that because the specific upland sources are not known, the listing would only be of the sediments. I submit that we are dealing with one unified site and that this site can not be divided up between state and federal authorities. Such a course of action would be completely infeasible, both legally and technically.

In early communications with Chuck Clarke of Region 10 EPA, the CTUIR expressed a great deal of concern about the vulnerability of ODEQ to political pressure from the state executive and legislative branches. If ODEQ is given primary authority over the clean-up on the upland sites under state authority, then there is a risk that the legislature could cut their funding or state law could be changed which would effect the quality of the clean-up. This is not a circumstance where the state is motivated to do as thorough a job as EPA. The motivation of the state is to

¹ The letter is on the ODEQ website at <http://www.deq.state.or.us/wmc/cleanup/PortlandHarbor/govlet.htm> the Principles are available at <http://www.deq.state.or.us/wmc/cleanup/PortlandHarbor/statement.htm>

expedite clean-up for the least cost, and this does not always translate into the fullest protection of the natural resources we are trying to protect.

In the HRS Documentation Record (HRSDR), there is an indication that this listing only applies to the sediments and not the entire Portland Harbor area where NPL level contamination is present. For example the HRSDR states: "The source consists of contaminated sediments located between RM 3.5 and RM 9.2 in Portland Harbor on the Willamette River in Oregon . . .". Additionally the report states: "Up to 17 industrial operations have been identified as potential sources of contamination to Portland Harbor between RM 3.5 and RM 9.2, however, since not all sources of contamination to this river segment have been thoroughly investigated, the site is being evaluated as contaminated sediments with no identified source." This rationale is being used to justify looking only at the sediments and leaving the upland source identification to the state. This is not how Superfund sites are or should be designated.

EPA staff, in conversations with CTUIR staff, refused to characterize the Principles, proposed by Gov. Kitzhaber, as an agreement with EPA. That is to say that there is no formal agreement that embodies these Principles, yet EPA will be operating under them anyway. We have been unable to get a clear statement from EPA or ODEQ as to exactly what the Principles represent. If they are the underlying principles of the ODEQ-EPA understanding of how the clean-up will progress then they are invalid because they were negotiated without the federal NRTs and without any tribal input. These Principles have not been part of tribal consultation nor was there any public input other than comments to the Federal Register notice. In fact, since the March 10th meeting, there have been no formal communications from EPA or ODEQ to the tribe.

2. CONSULTATION

The July 27th Federal Register notice offers a clear explanation of Executive Order 13084. It states:

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected officials and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

65 Fed. Reg. 456131, 46137 (July 27, 2000).

The previous paragraph is entirely accurate, summarizing the EO. However, the next paragraph in the notice is completely erroneous and based on a fundamental misunderstanding of the facts and misapplication of logic. It reads:

This proposed rule does not significantly or uniquely affect the communities of Indian tribal governments because it does not significantly or uniquely affect their communities. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this proposed rule.

Id.

The circular logic in this statement is readily apparent, and just as readily wrong. The CTUIR has been involved in discussions involving Portland Harbor for over 18 months, and during that time we have not been funded by EPA for that involvement. Because the sediments have injured and will continue to injure treaty protected resources of the CTUIR, we have maintained a level of involvement necessary to remain informed with our own financial resources.

3. TRUST RESPONSIBILITY/NATURAL RESOURCE TRUSTEE STATUS

Under the Treaty of 1855, the CTUIR maintains the right to hunt, fish, and gather at all usual and accustomed stations. Article I of Treaty of 1855 provides:

Provided, also, that the exclusive right of taking fish in the streams running through and bordering said reservation is hereby secured to said Indians, and at all other usual and accustomed stations in common with citizens of the United States, and of erecting suitable buildings for curing the same; the privilege of hunting, gathering roots and berries and pasturing their stock on unclaimed lands in common with citizens, is also secured to them.

Treaty with the Walla Walla, Cayuse, etc., 1855, 12 Stat. 945, Ratified March 8, 1859.

Because Willamette Falls in Oregon City is one of the last remaining eel fisheries and that all pollutants within the Willamette River have come into contact with salmon in the Columbia River, a treaty protected resource, the CTUIR is a Natural Resource Trustee. The listing proposal identified the endangered and threatened species that utilize the habitat within the Willamette River. Because these pollutants impact the fisheries, they also impact the tribal members who harvest these resources. Tribal member populations have a much higher consumption rate of salmon than other population groups.

The Principles identify that "EPA will maintain its trust responsibility to each tribe. DEQ will assist EPA in carrying out its responsibilities by continuing to coordinate and provide information to interested tribes on the project where the DEQ has the lead, and on the project as a whole. DEQ will continue to provide opportunities for the tribes to participate in state-led efforts." The provision that ODEQ will "continue to provide opportunities for the tribes to participate in state-led efforts" is misleading to the extent that ODEQ made any but the most token efforts at tribal participation. ODEQ set up Technical Exchange Workgroups and Stakeholder Advisory Groups

CTUIR letter to EPA re: Portland Harbor

Page 4

to handle tribal participation/input. The idea of advisory groups, particularly in this structure, limits the effectiveness of tribal consultation. The Stakeholder Advisory Group includes environmental organizations and community groups, without any reference to how these groups will be chosen. To lump tribes together with vague "community groups" is to ignore the treaty protected interests of the tribes and reduce their input to that of mere "interested parties."

4. FUNDING FOR TRIBAL PARTICIPATION

The principles state that "It is anticipated that most if not all of the investigation, cleanup, and tribal and trustee participation will be funded by the PRPs." Since the March 10th meeting, neither EPA nor ODEQ have offered an avenue to provide for tribal participation for existing actions, other than potential grants for which there is limited funding. If the PRP's are going to fund tribal involvement, ODEQ and EPA have not adequately involved the tribes in determining what level of involvement we will be funded at. Secondly, during the deferral process, the tribes expended a great deal of staff resources that neither EPA nor DEQ could fund. The only avenues provided by ODEQ to fund tribal participation was reimbursable travel expenses and Remedial Investigation/Feasibility Study specific funding. Until the tribes have funding that is not limited to a specific, state-defined, work product, the tribes will remain unfunded to define and protect their treaty reserved rights in Portland Harbor.

5. LISTING PROPOSAL

There is one glaring error contained in the HRS DR. The statement reads:

The width of contaminated sediments is not known but is estimated to be a minimum of 10 feet since contamination is known to be present on both sides of the river throughout this segment (see Section 2.2). The depth of contamination is 10 centimeters (i.e., 0.39 inches, or 0.08 feet). Therefore, the volume of contaminated sediments is estimated to be a minimum of 892 cubic yards $[(30,096 \text{ feet} \times 10 \text{ feet} \times 0.08 \text{ feet}) / 27 \text{ cubic feet per 1 cubic yard}]$.

HRS DR, May 15, 2000, pg. 44.

First of all, the statement indicates that 10 cm. equals .39 inches, or .08 ft. Ten centimeters **actually** equals 3.937 inches, or approximately .32 feet. Carrying the equation forward then, $[(30,096 \text{ feet} \times 10 \text{ feet} \times .32 \text{ feet}) / 27 \text{ feet per 1 cubic yard} = 3566.93 \text{ cubic yards.}]$ The analysis therefore missed over 2000 cubic yards and **underestimated the amount of contaminated sediment by a factor of four**. While I recognize that this number is for the rating of the site and as to whether it is of sufficient danger to the public to be placed on the NPL, this type of error casts doubt upon the reliability of the entire report. Secondly this statement assumes that the depth of contamination is 10 centimeters, an assumption that can not be made until all the sediments are tested. In the first sentence of the quote concludes that the sediment is at a

minimum 10 feet wide even though it is present on both sides of the river.. This represents a vast understatement of the potential contamination that exists within Portland Harbor based on existing information.

6. CONCLUSION

I understand some of these concerns may be the result of a lack of full comprehension of the CERCLA, however this only further demonstrates that effective consultation has not occurred. CTUIR staff have met with EPA to discuss this listing, but they could get no straight answers as to exactly what effect the splitting of authorities will do to the NRTs interests. Indeed, even the Principles of Agreement recognize that the EPA has a trust responsibility to the tribe, yet that trust responsibility does not apply to the state when it acts under its own authority under state law. There is no corresponding duty upon the state similar to the trust responsibility held by EPA, and because of this we can not support a state lead on the upland sites under state authority.

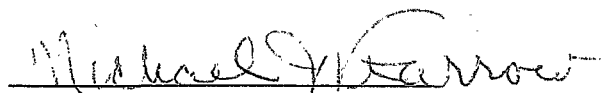
At this time the CTUIR can not support the Region 10 proposal to only list the sediments in Portland Harbor. It is our belief that in order to preserve the treaty protected resources and fulfill EPAs trust responsibility, the entire site, upland and sediments must be listed on the NPL as a Superfund site. It is not feasible to list only a portion of a given site and bifurcate legal authorities for the clean-up. Such an approach would not only hopelessly confuse the clean-up process but would also jeopardize the interests of the Natural Resource Trustees who would have to divide their resources between two clean-up actions. The legal complexities of such a situation do not appear amenable to early resolution.

If a final decision is to be made as to whether the site should be listed as proposed by Region 10 EPA, several things must be accomplished:

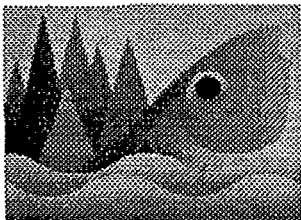
1. The site must be listed in its entirety, including all upland and in-water contamination.
2. A proposal from EPA regarding how they will be able to meet the trust responsibility owed the tribe and a specific plan to consult with the tribes.
3. A draft agreement which EPA intends to enter with DEQ to provide guidance for clean-up responsibilities.
4. There must be an agreement or plan of EPA and ODEQ with the tribes in order to provide funding for tribal participation.

I hope these comments are helpful. I look forward to future conversations with EPA regarding the future of Portland Harbor. If you have any questions or concerns, please feel free to contact myself or Audie Huber, Intergovernmental Affairs Manager, Department of Natural Resources, 541-966-2334.

Sincerely,


Michael Farrow, Director, Department of Natural Resources
Confederate Tribes of the Umatilla Indian Reservation

cc: Director, ODEQ
Administrator, Region 10, EPA
Sally Thomas, Region 10, EPA
Lynn, Hatcher, Yakama Nation
Kathleen Feehan, Grand Ronde Tribe
Nez Perce Tribe
Brad Nye, Warm Springs
Siletz Tribe
Don Sampson, Executive Director, CRITFC



Portland Harbor Cleanup

Statement of General Principles

10072

Portland Harbor Cleanup Statement of General Principles

Purpose: Establish relationship framework between EPA and DEQ for implementation of the Portland Harbor Cleanup Program.

Background: EPA and DEQ have identified CERCLA National Priorities List-caliber contamination along the lower Willamette River in the Portland Harbor. Both EPA and DEQ have statutory responsibility and authority to cleanup the contamination. To meet our mutual goal of ensuring an environmental cleanup that is protective of public health and the environment, the agencies are determined to work together in an atmosphere of mutual respect for each agency's work and expertise.

The following statement of general principles identifies the general role each agency will have on this project. The specific roles and responsibilities for each agency will be set out in a Memorandum of Agreement that will also establish a decision framework process for areas in which EPA and DEQ have joint responsibility.

Portland Harbor Cleanup Approach

DEQ and EPA have identified eight general principles to guide the Portland Harbor Cleanup.

1. The Portland Harbor Cleanup will be directed by a joint EPA/DEQ Project Team (Team), which will work together to creatively solve problems and accomplish environmental goals.
2. The Portland Harbor Cleanup includes upland and in-water contamination. DEQ, using state cleanup authority, will have lead technical and legal responsibility for the upland contamination and for coordinating with EPA on upland contamination, which may impact in-water contamination. EPA, using federal Superfund authorities, will have lead technical and legal responsibility for in-water contamination. Under the auspices of EPA's lead on in-water contamination, DEQ will provide technical support, coordination of state critical initiatives, and assistance in implementing the public involvement program.
3. Each agency will appoint a management lead for the Team. The management lead will be responsible for managerial-level decisions on the Project and will provide the initial management level for resolution of technical team disagreements. The management lead for each agency will jointly develop a decision-making process that describes who will be responsible for dispute resolution up through and including the Director of DEQ and Regional Administrator of EPA.
4. Each agency will appoint a technical lead for the Team. The technical lead will be responsible for bringing their agency's technical expertise to the table to explore, evaluate, select, and support the technical approaches of the Team. The technical lead will be responsible for coordination of the Team to reach agreement on issues and concerns or will move unresolved issues to the management lead for consideration and resolution.
5. Each agency will identify a lead legal representative who will work with the Team and the corresponding agency's legal representative to develop the legal strategy for the Project.

6. EPA, in order to better facilitate team building and coordination, will maintain a staff presence in Portland, including locating a lead Project Manager in Portland. The agencies will explore the possibility of co-locating team members in a joint office. The project team will hold routine meetings in Portland and the project will begin with a professionally facilitated team building effort.

7. The Team will develop a media communications plan for the purpose of providing a consistent and coordinated message. The plan will include but not be limited to describing: how the Team will interact with the media; who will represent the Team on various issues; and, how the technical and management team leads will be kept informed about media contacts.

8. The Team will develop a coordinated strategy for working with the PRPs.

Implementation of the roles and responsibilities outlined below are based on establishing the joint team approach described above.

State Critical Initiatives

Oregon has embarked on a number of natural resource initiatives, several in response to federal statutes. These initiatives are of critical importance and will be appropriately integrated into the Portland Harbor Cleanup. The initiatives include but are not limited to:

TMDLs: DEQ is developing and implementing total maximum daily loads (TMDLs) for water quality limited parameters in the lower Willamette River in response to Clean Water Act requirements. As work proceeds on harbor cleanup efforts, the Team will coordinate sediment cleanup standards with TMDL development. Once TMDLs are established for the Willamette River, the TMDLs will be among the requirements in-water remediation will have to meet.

CSOs: DEQ has required the development and implementation of a combined sewer overflow control program in response to Clean Water Act requirements for the City of Portland. The Team will assure that its activities in the Portland Harbor Cleanup meet, if not exceed, the requirements of the CSO program.

Oregon Plan: DEQ has developed and is implementing responsibilities under the Oregon Plan, the state's natural resource program for salmon and watershed protection. DEQ, in coordination with the federal natural resource agencies, will advise the Team as to whether Oregon Plan activities are being developed and/or implemented which may impact activities conducted by the Portland Harbor Cleanup.

DEQ will be responsible for alerting the Team of any conflicts it sees between team cleanup strategies and any state initiative.

The Team technical lead will be responsible for evaluating issues and concerns between state initiatives and cleanup efforts and resolving the concerns or moving disputed issues to the management lead and up through the management decision-making process.

Project Strategy

• The Team's initial work task will be to evaluate the work plan developed by the State during its deferral effort to ensure that all of the major elements of the State's work plan are incorporated into the Statement of Work, which will be attached to the proposed EPA sediment RI/FS Administrative Order on Consent to begin negotiations. The State's work plan in its entirety will be presented to the PRPs for their consideration with all sections previously commented on by trustees and tribes that participated in the work plan development specifically identified and those comments included. If the PRPs elect not to propose to utilize the state work plan approaches in their draft work plan, they will do so with an understanding that further consultation will be needed with the trustees and tribes. In any event, tribes that did not participate in work plan development must be consulted even where the PRPs may

select to utilize portions of the state's work plan.

- The technical lead will draft all decision documents in conjunction with the Team.
- The in-water technical lead will have the lead responsibility on ESA Section 7 consultations, and will coordinate closely with the Team on other ESA and natural resource issues related to the river.

Project Coordination

- The Team will develop and implement a Portland Harbor Cleanup Public Involvement plan. The public involvement plan will reflect the lead agency for implementing various portions of the plan.
- EPA will maintain its trust responsibility to each tribe. DEQ will assist EPA in carrying out its responsibilities by continuing to coordinate and provide information to interested tribes on the project where the DEQ has the lead, and on the project as a whole. DEQ will continue to provide opportunities for the tribes to participate in state-led efforts.
- EPA will take a lead role in negotiations to implement in-water work.
- EPA will have the lead role for enforcement of in-water investigation and cleanup.
- The Team will work directly with the trustees on natural resource damage issues.

Upland Sites

- DEQ will take the lead in negotiations with the PRPs on upland facility work. DEQ may request EPA assistance on specific upland sites.
- DEQ will continue to be the lead enforcement agency for upland work, including source control. The specific strategy will be included in the memorandum of agreement between the agencies.
- DEQ will continue its communications with and provide information to the trustees and provide them the opportunity to participate in state-led efforts.

Funding

- It is anticipated that most if not all of the investigation, cleanup, and tribal and trustee participation will be funded by the PRPs.
- One or both of the agencies will issue unilateral orders to ensure timely performance of work by recalcitrant responsible parties.
- DEQ intends to recover its costs for all Project work to date, including development of the management plan and the RI/FS work plan.
- Both agencies intend to recover all future direct and indirect project costs, and to coordinate their cost recovery efforts.



For specific site information please e-mail gardner.sara@deq.state.or.us, or contact Sara Gardner at the DEQ Northwest Region Voluntary Cleanup and Site Assessment Program, 2020 SW 4th Avenue, Portland, Oregon 97201, (503)229-5158 or toll-free in Oregon 1-800-452-4011.